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In The
Supreme Court of the United States

OCTOBER TERM, 1954

No. 274

PHILLIPS PETROLEUM COMPANY,
a corporation,
Petitioner,

VERSUS

CABOT CARBON COMPANY,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RAYBURN L. FOSTER,
HARRY D. TURNER,
R. M. WILLIAMS,
Phillips Building,
Bartlesville, Oklahoma;

CECIL C. HAMILTON,
1211 First National Building,
Oklahoma City, Oklahoma,
Attorneys for Petitioner.

AUGUST, 1954

KING LAW BRIEF CO., 222 N.W. THIRD, OKLAHOMA CITY — PHONE FO 5-2969

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In The
Supreme Court of the United States

OCTOBER TERM, 1954

No.

PHILLIPS PETROLEUM COMPANY,
a corporation,

Petitioner,

VERSUS

CABOT CARBON COMPANY,
a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Phillips Petroleum Company ("Phillips") prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit affirming a judgment of the United States District Court for the Western District of Oklahoma in favor of the respondent, Cabot Carbon Company ("Cabot"), against Phillips for $387,282.37, arising out of orders of the

Oklahoma Corporation Commission prescribing a minimum price for gas produced in the Guymon-Hugoton Field.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 124), written by Judge Huxman, concurred in by Judge Murrah, with Judge Pickett dissenting (R. 130), is reported in 210 F. 2d 841.

The opinion of the District Court for the Western District of Oklahoma (R. 13) is reported in 114 F. Supp. 953.

JURISDICTION

The judgment of the Court of Appeals was entered February 12, 1954 (R. 134). An order was entered March 4, 1954 (R. 134) extending to and including March 24, 1954, the time for filing a petition for rehearing. Petition for rehearing (R. 139) and application for hearing thereof *en banc* (R. 135) were filed March 24, 1954 and denied April 12, 1954 (R. 175).

By an order signed by Justice Tom C. Clark entered and filed by the Clerk of this Court on July 9, 1954, the time within which petitioner may file its petition for a writ of certiorari was extended to and including August 11, 1954.

Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

The Corporation Commission of Oklahoma entered an order effective January 1, 1947, which provided that "no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton Field in Texas County, Oklahoma, at a price, at the wellhead, of less than 7c per thousand cubic feet of natural gas." Effective August 1, 1952, the minimum price was increased to 9.8262c per thousand cubic feet.

In 1944 Cabot assigned to Phillips certain oil and gas leases on lands in the Hugoton gas field, in consideration of $530,673.50 cash, and an overriding royalty of 4c per thousand cubic feet of ¼ of ⅞ of all the gas produced. By these assignments Cabot transferred to Phillips all its interest in the leases which included all rights to drill for, produce and dispose of the gas.

The judgment of $387,282.37 represents the difference with interest for the period January 1, 1947, to November 1, 1952, between the amount of the overriding royalty as provided by the contract and an amount computed by substituting the minimum prices of 7c and 9.8262c, respectively, for the 4c specified in the contract.[1]

On July 16, 1954, the Corporation Commission of Oklahoma, after due notice and hearing, entered an order construing and applying its minimum price orders to the

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[1] The judgment also provides that Cabot recover from Phillips "such additional sums, together with interest at 6% thereon, as have accrued for gas sold by Cabot to Phillips at 9.8262c per thousand cubic feet from November 1, 1952 to this date" (R. 20).

factual situation here involved, and decreed that no producer shall be required by reason of said orders to pay to the owners of any royalty, overriding royalty or other interest in the gas any sum in excess of that required to be paid by the terms of the contracts.

The questions presented are:

1. In view of the decision and order of the Corporation Commission construing and applying its minimum price orders to the factual situation here involved in a manner directly opposed to the decision of the Court of Appeals, should this Court recognize the state law and policy to be as declared by the Corporation Commission, the agency which made the orders, and reverse the judgment of the Court of Appeals or remand the case to that court for further consideration.

2. Whether said minimum price orders, as construed and applied by the Court of Appeals, contravene the contract impairment (Section 10 of Article 1) and the due process clause (Section 1 of the Fourteenth Amendment) of the Constitution of the United States.

3. Whether the Court of Appeals should have avoided the serious constitutional question here presented (1) by staying further proceedings pending interpretation and application by the state tribunals of the minimum price orders to a factual situation comparable to the one here involved, and pending final decision of the constitutional validity of the second order; or (2) by construing said orders as not applying to fixed price overriding royalties.

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4. Whether the Court of Appeals correctly interpreted and applied the minimum price orders to the fixed price overriding royalty so as to nullify the contractual provision of the parties and increase the costs of the producer, and whether the Court of Appeals, in interpreting the minimum price orders, violated settled state law in respect to the ownership of oil and gas in place.

STATUTES INVOLVED

Involved are Orders Nos. 19514 (R. 60-67), 19702 (R. 84-87), 26096 (R. 96-101) and 28884 of the Corporation Commission of Oklahoma and Sections 239, 112 and 241, Title 52, O. S. 1951, under which said orders were made. Order No. 28884 is printed as Appendix A and the Statutes as Appendix B.

STATEMENT OF THE CASE

This action was brought by Cabot against Phillips in the United States District Court for the Western District of Oklahoma. Jurisdiction was based solely upon diversity of citizenship (R. 3). The action involves the interpretation and application of orders of the Corporation Commission of Oklahoma (Commission) fixing the minimum price of gas in the Guymon-Hugoton Field in Texas County, Oklahoma, as applied to the agreed rate of overriding royalty payments by Phillips to Cabot under a contract whereby Phillips, a producer, acquired gas leases in the Hugoton field from Cabot. The judgment for $387,282.37 (R. 20, 134) represents the dif-

ference between the amount called for and paid by Phillips under the contract and the amount payable if the orders control for the period January 1, 1947 to November 1, 1952, with interest to July 13, 1953 (R. 20).[2]

Contract Rights of Parties

By written contract dated March 10, 1944 (R. 31), Cabot, in part as lessor and in part as assignor, agreed to execute and assign to Phillips gas leases covering approximately 43,500 acres of land, 39,000 acres being located in the Guymon-Hugoton Gas Field. Phillips, under the contract, leases and assignments[3] became the lessee with the exclusive right to develop and operate the leases and to produce and dispose of all of the gas. As consideration, in addition to the payment by Phillips of a cash bonus of $530,673.50 (R. 32) and the usual and typical lessor's royalty of 1/8 of the market value or proceeds of sale of the gas produced with respect to those lands in which Cabot held fee title to the gas rights (Paragraph 3, R. 47), the contract (Paragraph 4, R. 32), leases (Paragraph 12, R. 50), and assignments (R. 44) reserved to Cabot an overriding royalty payable by Phil-

[2] On the basis of the Commission order presently in effect it is estimated that over the productive life of the leases the principal amount payable will exceed by $3,000,000 the amount payable under the contract, if the Court of Appeals' interpretation is sustained.

[3] It is stipulated (R. 22 and 23) that Plaintiff's Exhibits 2 (R. 43), 4 (R. 46), 7 (R. 56) and 8 (R. 59) are typical of the leases, assignments and other instruments executed by the parties pursuant to the contract. All contain substantially the same language as to the rights and interests of the parties.

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lips at the *fixed rate* of 4c per Mcf of ¼ of ⅞ of all gas produced measured on a 16.4-pound pressure base. Although the contract refers to the overriding royalty as an "interest" in the gas, it otherwise expressly limits such interest to a cash royalty payment at the 4c rate. Such payment is unaffected by "market value," "proceeds of sale" or what Phillips does with the gas. The contracts expressly provide that Phillips shall become the owner of the gas "when produced" (R. 32)[4] without limitation as to the disposition thereof.

The Contract (R. 34), the parties (R. 45, 51, 55, 119 and 120), the trial court (R. 16) and the Court of Appeals all refer to the payment to Cabot as a "royalty" or "overriding royalty" payment.

Orders of the Commission

On December 9, 1946, (subsequent to the making of the contract, leases and assignments and the development of the properties herein involved), the Commission entered its Order No. 19514 (R. 60-67) providing that from and after January 1, 1947, "no natural gas shall be taken out of the producing structures or formations" of the Guymon-Hugoton Field "at a price, at the wellhead, of less than 7c per thousand cubic feet" measured on a 14.65-pound pressure base. The order was based upon findings by the Commission disclosing the necessity for "producers" to receive the minimum price specified

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[4] Under Oklahoma law no one owns gas before it is produced (See cases cited, *infra*, p. 43, note 18.

for gas produced in the field and the abuses calling for the establishment of a minimum price as a condition to the production of the gas.

By Order No. 19702 entered February 4, 1947 (R. 84-87), the Commission, in denying an application of Phillips to vacate or clarify Order No. 19514, found that waste of gas would result unless *"PRODUCERS* in said *field"*[5] receive or realize the equivalent of the prescribed minimum price therefor; that Order No. 19514 was "meant to prohibit the *production* of natural gas" unless the gas "should be so utilized and/or sold, that the *PRODUCER* would realize therefrom the equivalent" of the prescribed price; and that Phillips was not injured by the order because it was then "realizing from the utilization and sale of natural gas produced by it" in the field the equivalent of such price and was therefore "already complying" with the order.

On July 29, 1952, the Commission entered its further Order No. 26096 (R. 96-101) increasing the minimum price to 9.8262c per thousand cubic feet effective August 1, 1952.

Appeals From the Minimum Price Orders

Orders Nos. 19514 and 19702 were upheld by the Oklahoma Supreme Court and by this Court as applied to the price a *producer* must *realize* as a condition to the production of the gas. *Cities Service Gas Co.* v. *Peerless*

[5] Emphasis in quoted mtaerial in this petition is ours unless otherwise stated.

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Oil & Gas Co., 203 Okl. 35, 220 P. 2d 279, *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, and *Phillips Petroleum Co.* v. *State of Oklahoma*, 340 U. S. 190.

Order No. 26096 was upheld April 27, 1954, by the Oklahoma Supreme Court by a 5 to 4 decision in the case of *Natural Gas Pipeline Co. of America et al.* v. *Corporation Commission of Oklahoma*. Petition for rehearing was denied July 6, 1954. The opinion is not yet officially reported but is to be found at page 831 of Volume 25 of The Journal, an official publication of the Oklahoma Bar Association. As in the appeal from Order No. 19514, the appeal had to do only with sales of gas by *producers* and what such *producers* must *realize* as a condition of production, and *not* what a producer must pay as an overriding royalty.[6]

Theories of the Courts Below

In brief, the opinion of the trial court in this case (114 F. Supp. 953; R. 12) is based on the premise that the contract, leases and assignments herein involved reserved to Cabot ownership of ¼ of ⅞ of the gas *in place in the ground* before production; that by reason

[6] One of the principal grounds urged for rehearing was the decision of this Court in the cases of *Phillips Petroleum Co. v. State of Wisconsin*, No. 280; *State of Texas* v. *State of Wisconsin*, No. 281; and *Federal Power Commission* v. *State of Wisconsin*, No. 418, decided June 7, 1954, as it relates to the authority of the state to regulate the price of gas destined for movement in interstate commerce. Should this Court reverse said decision on appeal from the Supreme Court of Oklahoma the basis for that part of the judgment herein would no longer exist.

thereof Cabot was a "joint owner" of the "leasehold estate" and a "joint producer and seller" of the gas and that Phillips was a "joint producer and purchaser" thereof; and that under the Commission orders, Cabot, a "producer," is required to get and Phillips, the "purchaser," is required to pay the prescribed minimum price.

The majority opinion of the Court of Appeals (210 F. 2d 841, R. 124), although concurring in the view of the trial court as to the ownership of the gas in place, did not adopt the view that Cabot was a joint owner of the "leasehold estate," or was a "joint producer" or "seller," but based the decision on the theory that the orders are a "regulation" of the "first transaction involving the obligation to pay or account for gas," regardless of whether it be what the producer must realize or what the producer must pay to others, and that as such had been upheld by the Oklahoma Supreme Court and by this Court in the case of *Cities Service Gas Co.* v. *Peerless Oil & Gas Co., supra.*

The Court recognized that the constitutional question here presented was not before the courts in that case but concluded nevertheless that the decisions settled the constitutionality of the orders as it construed and applied them.

Subsequent Order of the Corporation Commission in Conflict with the Court of Appeals' Interpretation of the Minimum Price Orders

By order No. 28884 entered July 16, 1954, the Corporation Commission of Oklahoma construed and applied its minimum price orders to the factual situation here involved and decreed as follows:

> "2. That Order No. 19514 in Cause CD No. 1054 and Order No. 26096 in Cause CD No. 3628 shall be interpreted and applied in accordance with the purpose and intent ascribed thereto in Finding No. 5 hereof, which interpretation and clarification of said orders shall become and be treated and regarded as a part of said orders and shall have the same force and effect as if expressly stated in the orders when originally entered.
>
> "3. That no producer in the Guymon-Hugoton Field shall be required by reason of either said Order No. 19514 or Order No. 26096 to pay to the owners of any royalty, overriding royalty or other interest in the gas any sum in excess of that required to be paid by the terms of their contracts."

Finding No. 5 referred to in paragraph (2) of the Order reads as follows:

> "5. Said Order No. 19514 and Order No. 26096 were intended and are to be interpreted and applied as a regulation of the production of gas from the Guymon-Hugoton Field by and to the extent of requiring that a producer, who has the right to operate wells or to take or to market the gas therefrom, receive or realize for the gas so produced a sum equivalent to the prescribed minimum price. In entering said orders the Commission contemplated and intended that the landowners, usual and typical roy-

alty owners, and other persons whose royalty, overriding royalty or other interest in the gas is by contract measured by or dependent upon the market value or proceeds of sale thereof by the producer would under and as a consequence of the terms of their contracts be entitled to payment based upon the minimum price the producer is so required to realize. It was not the intent of the Commission nor the purpose of said orders to modify or affect in any way the contractual basis or rate of royalty or overriding royalty, or other payments required to be paid by such producer or to require that such producer pay the owner of any such royalty, overriding royalty or other interest in the gas a sum in excess of that required to be paid by the contract. The Commission does not consider that it has such authority. To require such producer to pay the owner of a royalty, overriding royalty or other interest in the gas a sum in excess of that required to be paid by their contract would in no way prevent or tend to prevent either physical or economic waste of natural gas, protect or tend to protect the correlative rights of any person or persons owning any interest in the Guymon-Hugoton Field or in any way protect the interest of the public" (See Appendix A for the entire order).

This order was entered upon application of Phillips filed pursuant to the provisions of Sections 112 and 241, Title 52, O. S. 1951, printed in Appendix B.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals' Decision is Directly Opposed to a Decision of the Corporation Commission of Oklahoma in Respect to the Interpretation and Application of its own Minimum Price Orders which Decision is Conclusive upon the Federal Courts as to the Meaning and Application of said Orders.

(a) The fact that the decision of the Corporation Commission was Subsequent to the Court of Appeals' Decision does not Militate against its Controlling Effect here.

On May 24, 1954, Phillips filed with the Corporation Commission of Oklahoma an application for directions concerning its obligation under the minimum price order to Cabot and The Texas Company, with whom Phillips had contracts for the payment of fixed price overriding royalties in the Guymon-Hugoton field (See Appendix A-1).

After notice and hearing, the Commission, by order entered on July 16, 1954, decreed that it was not the intention of the Commission by its minimum price orders to require producers to pay to fixed price overriding royalty owners, such as Cabot and The Texas Company, any sum in excess of the amount called for by their contracts, and that such interpretation and clarification of said orders should be treated and regarded as a part of said orders with like force and effect as if expressly stated in the orders when originally made. The Commission further found that the orders when construed so as to change contractual provisions for the payment of over-

riding royalties would not prevent waste or protect correlative rights and would be beyond its authority to make.

The Commission also ordered that no producer should be required by reason of said orders to pay to the owners of any royalty or overriding royalty or other interest in the gas any sum in excess of that required to be paid by the terms of their contracts. (See *supra*, p. 11; see also Appendix A for the entire order.)

This proceeding was authorized by Sections 112 and 241, Title 52 O. S. 1951 (See Appendix B).[7]

The Supreme Court of Oklahoma has previously sustained the power of the Commission to interpret, apply and enforce its minimum price orders for gas. *Natural Gas Pipe Line Company of America* v. *Panoma Corporation et al.*, 271 P. 2d 354.[8]

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[7] Sec. 112 authorizes any person affected by any legislative or administrative order to apply to the Commission to repeal, amend, modify, or supplement the same.

Sec. 241 authorizes any person to apply to the Commission for a hearing "upon any question relating to the enforcement of this Act" and confers jurisdiction upon the Commission "to hear and determine the same" after notice and hearing.

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[8] Panoma, a producer, applied to the Commission to require Natural Gas Pipe Line Co., a purchaser of gas from Panoma, to pay the difference between the amount paid by Natural to Panoma under contract and the amount required to be paid under the minimum price order as Panoma construed it, which construction Natural opposed. The Commission agreed with Panoma's construction and ordered Natural to pay the difference. The decision was affirmed by the Supreme Court of Oklahoma. In response to the contention of Natural that the order of the Commission amounted to a money judgment which the Commission was without power to render, the Supreme Court said:

The order of the Corporation Commission is entitled to as much weight (and we submit more, see *infra*, pp. 16-20) in establishing state law and policy as a decision by the New Jersey Chancery Court, which this Court held binding upon the Federal Courts in the absence of a decision by a higher state court. *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169. All the reasons advanced in that case for following the Chancery Court are at least equally persuasive for following the decision by the Corporation Commission *in the interpretation and application of orders which it made.* No other tribunal is equally competent to make that decision.[9]

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[8] *Continued*

"Commission could not enforce it as a money judgment, however, this does not mean that commission is without any power to enforce compliance with its valid price-fixing order. *As in case of any other valid order, commission may require compliance therewith by any other order within its authority, so, in this case, while commission could not require Natural to pay this sum, it could prohibit Natural from taking further gas until it brought itself into compliance with the effective price order by making the payment. If it were otherwise commission would be powerless to take any steps to require compliance with its valid orders in the highly important program of conservation, and might as well not make them.*"

The case is now pending in this Court on appeal, No. 191, October Term, 1954.

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[9] The Corporation Commission has the powers of a court of record. Const. Art. 9, Sec. 19. *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, *St. Louis & S. F. Ry. Co.* v. *State*, 116 Okl. 95, 244 P. 440.

Only the Supreme Court can review and reverse the decisions of the Corporation Commission. Const. Art. 7, Sec. 10; Art. 9, Sec. 20. Review by the Supreme Court is limited, except when constitutional questions are involved, to determining whether the Commission has regularly pursued its authority and whether its

The Supreme Court of Kansas recently considered the effect of an interpretation by the Corporation Commission of its minimum price order for gas. *Columbian Fuel Corp.* v. *Panhandle Eastern Pipe Line Co.*, 271 P. 2d (Adv. Op.) 773 (June 12, 1954).

The case involved the right of a producer to recover interest upon the difference between the contract price and the minimum price fixed by the Corporation Commission for gas produced. In considering the effect of the Commission's interpretation of its own orders, the Court said (271 P. 2d at 779):

> *"The rule that an administrative body's interpretation of its own rules, orders or regulations, in case of ambiguity, is entitled to great weight—some courts say controlling weight—is universally recognized. Harrison* v. *Masonic Mutual Benefit Society*, 61 Kan. 134, 140, 59 P. 266; *Leavenworth Nat. Bank* v. *Reilly*, 97 Kan. 817, 823, 156 P. 747. *The original order pertaining to payment of differences must be construed in the light of the commission's final order interpreting its intent. Georgia Public Service Comm.* v. *United States*, 283 U. S. 765, 771, 51 S. Ct. 619, 75 L. ed. 1397. When so read all uncertainty of its intent is removed. *An interpretation of an administrative order or regulation by the administrative agency becomes of controlling weight and will not be disturbed unless clearly erroneous or inconsistent with the regulation. Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 65 S. Ct. 1215, 89 L. ed. 1700."

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[9] *Continued*
findings and conclusions are sustained by the law and substantial evidence. *Cities Service Oil Co.* v. *Anglin*, 204 Okl. 171, 228 P. 2d 191.

Three paragraphs later the Court said:

"Here any possible doubt was completely dispelled by the commission's interpretation of its own order."

The Court went on to say that the suit for recovery of interest was a collateral attack upon the Commission's interpretation of its own order, because the statutes authorized the Commission "to *interpret and enforce* its own rules, orders and regulations *and to determine any right thereunder*, in the manner provided in G. S. 1949, 55-605. See G. S. 1949, 55-706" (Italics by the Court).

The Kansas statutes referred to are substantially like the Oklahoma statutes. It may well be that the Oklahoma Supreme Court would hold that a proceeding before the Corporation Commission, under the circumstances in this case, is the exclusive method of enforcing the minimum price orders, bearing in mind that the Corporation Commission found that Phillips had complied with the order for a substantial portion of the period during which the federal court found that Phillips had *not* complied with the order.

Be that as it may, it is sufficient that the interpretation by the Commission of its own orders is conclusive upon the courts unless plainly erroneous subject only to review in the manner provided by statute.

In *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 413, this Court, in considering a wartime maximum price order, said:

"The problem in this case is to determine the highest price respondent charged for crushed stone dur-

ing March, 1942, within the meaning of Maximum Price Regulation No. 188. Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. *But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.*"

In *West Texas Compress & Warehouse Co.* v. *Panhandle & S. F. Ry. Co.* (Texas), 15 S. W. 2d 558, 560, the Commission of Appeals of Texas, had this to say concerning the construction by the Railroad Commission of Texas of its own order with respect to the shipment and compression of cotton on through bills of lading:

"Since the commission is an instrumentality of the state, exercising delegated powers, its orders are of the same force as would be a like enactment by the Legislature. *It therefore follows that the interpretation officially placed on the order or rule by the commission becomes a part of the rule.*"

To the same effect, see *Foley* v. *Benedict*, 122 Texas 193, 55 S. W. 2d 805.

In 42 Am. Jur., P. 392, Sec. 77, it is said:

"An administrative body has power to interpret its own rules which have the force and effect of law, and such interpretation becomes part of the rule" (Citing *Foley* v. *Benedict, supra*).[10]

[10] The order of the Corporation Commission here under consideration expressly provides that the interpretation and clarification shall be a part of said orders as originally entered (*supra*, p. 11).

Other cases supporting the rule that the interpretation by an administrative body of its own orders is controlling or entitled to great weight are: *Mechanical Farm Equipment Distributors, Inc.* v. *Porter* (1946), 156 F. 2d 296, 297, C.C.A. 9; *Costello* v. *Acco Transport Co.* (1950), 232 S. W. 2d 297, 308, Ct. of App. of Tenn.; *Danielson* v. *Civil Aeronautics Board* (1953), 204 F. 2d 266, 268, C.C.A. 2; *Bowles* v. *Mannie & Co.*, (1946), 155 F. 2d 129, 133, C.C.A. 7; *National Labor Relations Board* v. *J. S. Popper, Inc.* (1940), 113 F. 2d 602, 603, C.C.A. 3; *Peck* v. *Greyhound Corp.* (1951), 97 F. Supp. 679, 681, U.S.D.C., S.D., N.Y.; *State ex rel. Orscheln Bros. Truck Lines, Inc.* v. *Public Service Commission* (K.C. Ct. App., 1937), 110 S. W. 2d 364, 366; *Coast Cities Coaches, Inc.* v. *Mack* (1953) 64 So. 2d 774, 780, S. Ct. Fla. See also 73 C.J.S. 483.

Thus it appears that the decision of the Corporation Commission is conclusive upon the courts as to the meaning of its own orders. But whether regarded as conclusive or as entitled to great weight or merely something to be considered and given such weight in the determination of state law and policy as the court may deem it entitled, it is something which the Court of Appeals did not have before it and something which might well change the result reached by that court. For this reason, the writ should be granted and the decision reviewed by this Court or remanded to the Court of Appeals for reconsideration in the light of the decision of the Corporation Commission. *Huddleston* v. *Dwyer*, 322 U. S. 232.

Even though the judgment below had been in accord with the state court decisions at the time it was rendered, it would have been the duty of this Court to reverse the decision if, in the meantime the state court decisions had been changed. *Huddleston* v. *Dwyer, supra.* Here the state law has not changed, but it has been authoritatively declared to be what the Court of Appeals should have found it to be but did not. (See *infra* pp. 35-45). It is the duty of this Court to see that this authoritative determination of the state law and policy is given effect by the federal courts.

In *Huddleston* v. *Dwyer, supra,* this Court said (322 U. S. at 236):

> " 'Until such time as the case is no longer *sub judice,* the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.' *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538, 542, 85 L. ed. 327, 330, 61 S. Ct. 347."

II.

The Minimum Price Orders as Construed and Applied by the Court of Appeals Constitute a Taking of Private Property and an Impairment of Private Contract for No Public Purpose, in Violation of the Due Process and Contract Impairment Clauses of the Constitution of the United States.[11]

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[11] They also violate the Due Process and the Impairment of Contract Clauses of the Constitution of Oklahoma, a point which was urged upon the Court of Appeals. The Supreme Court of Oklahoma has not passed upon this question, despite the assertion of the Court of Appeals to the contrary (*infra,* pp. 24-27).

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There is no doubt that the contract here involved provides for an overriding royalty. The majority opinion so characterizes it. There can be no doubt also that under the Oklahoma decisions, as well as under the decisions of the Court of Appeals applying Oklahoma law, an overriding royalty is a consideration for the leases and not a payment for the gas produced. *McCullough* v. *Almach*, 188 Okl. 434, 110 P. 2d 295; *McCullough* v. *Burks*, 185 Okl. 502, 94 P. 2d 541; *Carroll* v. *Bowen*, 180 Okl. 215, 68 P. 2d 773; *Hinkle* v. *Gauntt*, 201 Okl. 432, 206 P. 2d 1001; *Wright* v. *Brush* (10, C.C.A.), 115 F. 2d 265, 267; and *Alexander* v. *King* (10 C.C.A.), 46 F. 2d 235, 239.

It should be borne in mind that most overriding royalties, as well as landowners' royalties, provide for payment on the basis of proceeds of sale by the lessee or the market value of the gas or oil. Such royalties were "typical" in the Hugoton Field (see Plaintiff's Exhibit 44, R. 113, and Stipulation, R. 26). Such was the type of royalty owners mentioned in the Commission's findings and in the Oklahoma Supreme Court opinion in the *Cities Service case*, 220 P. 2d 279, 287.

Cabot's overriding royalty, however, was different. It provided for payment of "(4c) per MCF" times ¼ of ⅞ of the gas produced. Regardless of the "price" or "value" of the gas, whether sold or not sold, the rate of payment remains the same. Cabot's right to a ¼ of ⅞ overriding royalty was acquired as a part and parcel of the 4c price. The fractional interest and the 4c price are inseparable and inextricable. The combination of in-

terest and price was an agreed part of the consideration for the leases which Phillips bought from Cabot. If the price is increased, the fractional interest should be correspondingly reduced. Simple justice requires it.

Cabot and Phillips might well have made this transaction for the cash consideration without any overriding royalty. In that event no one would have said that the minimum price orders would entitle Cabot to anything additional. The overriding royalty might have been 10c per MCF of *1/16* of 7/8 of the gas produced. In that event no one would contend that the price orders would entitle Cabot to anything more. Yet by the circumstance that the parties saw fit to bargain for an overriding royalty of 4c per Mcf of 1/4 of 7/8 (which would amount to a greater sum than the example related above), the Court of Appeals has decreed that the minimum price orders require that several million dollars additional must be paid!

The orders do not require, and we submit do not permit, that cosntruction. See I, *supra*, pp. 13-20; IV, *infra*, pp. 35-45. It is our purpose here however to show that the orders, so construed, violate the Constitution of the United States.

There can be no question but that the effect of the judgment of the Court of Appeals is to require Phillips to pay to Cabot, for Cabot's own private enrichment and in disregard of the contract to the contrary, a huge sum of money (estimated in excess of $3,000,000 during the life of the contract).

Such a deprivation and taking of property cannot be condoned "without a justifying public purpose." *Thompson* v. *Consolidated Gas Utilities Corp.* (1937), 300 U. S. 55, 80. While private contracts are, of course, subject to the exercise of the police power and the public interest, the state "may not, under the guise of protecting the public, arbitrarily interfere with private business, or prohibit lawful occupations, or impose unusual or unnecessary restrictions upon them." *Jay Burns Baking Co.* v. *Bryan* (1924), 264 U. S. 504. The Oklahoma Supreme Court, in the recent case of *Oklahoma Natural Gas Co.* v. *Choctaw Gas Co.* (1951), 205 Okl. 255, 236 P. 2d 970, 977, expressly declared in respect to a so-called conservation order of the Oklahoma Corporation Commission:

> "The police power must at all times be exercised with scrupulous regard for private rights guaranteed by the constitution, and then only in the public interest and not for the benefit of a private company."

No one has or will dispute these basic principles of constitutional law. What public purpose then is served by construing these orders to require Phillips to pay Cabot this huge sum of money? Only two possibilities have been suggested. Cabot says that the orders may be sustained as a waste prevention measure[12]. The Court

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[12] In the trial court, respondent in its brief said:

> *"There is no public interest in having Cabot, as an individual corporation, receive any particular sum for its gas under the contract;* however, there is a public interest that a natural resource not be wasted, and the Corporation Commission has found on substantial evidence that to take gas from the Guymon-Hugoton gas pool at less than a specified price constitutes waste." (Cabot's Reply Brief, p. 19.)

of Appeals said that the orders were sustained by the Supreme Court of Oklahoma and by this Court in the interest of waste prevention and the protection of correlative rights (210 F. 2d at p. 844).

Neither the Supreme Court of Oklahoma nor this Court passed upon the orders as here construed and applied, and the *Cities Service case* does not support the decision below. Moreover, the orders cannot be sustained as waste prevention or correlative rights protection.

It is most significant and should be controlling that the Corporation Commission has disclaimed any purpose or power to enter orders as construed by the court below for the prevention of waste or the protection of correlative rights. On the contrary the Commission found as a fact that the orders as so construed would not accomplish such purposes (See *supra*, p. 12).

The Cities Service Case did not Settle the Constitutional Question Here Presented

Having so construed the orders as to raise a grave constitutional question (although the orders are clearly susceptible to a construction which would involve no constitutional question) the Court of Appeals resolved that question in favor of validity without making an independent examination of the constitutionality of said orders as it had construed and applied them, but in relying upon the decision of the Supreme Court of Oklahoma and the Supreme Court of the United States in *Cities Service Gas Company* v. *Peerless Oil and Gas Company*,

203 Okl. 35, 220 P. 2d 279, 340 U. S. 179, as having settled the constitutionality of said orders, notwithstanding said Courts had for consideration the constitutionality of the first order as construed and applied to an entirely different situation and bringing about a wholly different result. The record in the *Cities Service case* presented and the Supreme Court of Oklahoma and this Court decided the validity of said order insofar as it required producers of gas to *receive*, and the *purchaser* of gas from the producer to *pay* the minimum prices, with such benefits as might flow therefrom to royalty owners, the state and others whose interests (by the express provisions of contracts as to royalty owners and by express statutes as to the state) are affected or controlled by the amount which the producer receives or by the market value of the gas.[13]

The holding by the Court of Appeals that the constitutional questions here presented were decided by this Court in *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 340 U. S. 179, constitutes grave error.[14] A statute or legislative order may be generally constitutional and

[13] The usual royalty provision, and the typical royalty provision in leases in the Hugoton field, provides for "⅛ of the proceeds" or "⅛ of the market value" of the gas produced (R. 113).

[14] The Court of Appeals recognized that the question here presented was not before the Courts in the *Cities Service case*, but concluded that they passed upon the question any way. The Court said (210 F. 2d at p. 845):

> "While the specific question before the Oklahoma Court was as stated by Phillips *the validity of the order with respect to the rights and liability of Phillips as to the gas it purchased from Peerless Oil and Gas Company, the Oklahoma Supreme*

valid when applied in one manner or to one state of facts or situation or to one person or class of persons, and yet be invalid in its application in another manner or to another state of facts or situation or to another person or class of persons.

This Court in the case of *Watson* v. *Buck*, 313 U. S. 387, 402, said:

> "A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another. Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute *until faced with cases involving particular provisions as specifically applied to persons who claim to be injured*. Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case."

See also *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 289.

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[14] *Continued*

Court did not there decide only that narrow question. It viewed and considered the scope and effect of the statute and the powers of the Commission thereunder in its broadest aspect *and passed upon the constitutionality of all phases thereof* both with respect to the State and Federal Constitutions."

(The Court was in error in speaking of Phillips' purchases of gas from Peerless. It was the purchase of gas by *Cities Service*, a pipe line purchaser, from Peerless, a producer, that was involved in the *Cities Service case*. Phillips purchased no gas from Peerless. 340 U. S. 179).

There was nothing in the record in the *Cities Service case* to bring to the Court's attention the fact that there was such a thing as a lease purchase contract or overriding royalty payment in the Hugoton Field like that here involved. The court had before it no controversy between Cabot and Phillips or others in a like situation. The land and royalty owners present in the case were lessors under "typical leases" whose royalty was based on ⅛ of the "proceeds" received by the "lessee * * * from the sale of the gas" if sold, or if not sold, ⅛ "of its market value at the well."[15] The benefits of the order flowed to them by reason of the express terms of their lease contracts. No regulation of or change in the *contractual basis* of their royalty payments or other impairment of any lease or lease purchase contract was involved.

The Orders as here Construed and Applied do not Tend to Prevent Waste

It is impracticable if not impossible to produce all the gas existing in a gas reservoir. Conservation aims to recover the greatest amount reasonably recoverable before abandoning producing wells leaving unrecovered and lost forever such quantities of gas as cannot be economically produced. The volume of gas that can be produced gradually declines in all fields. When the volume that can be produced from day to day multiplied by the price that can be obtained for the gas ceases to

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[15] *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 203 Okl. 35, 220 P. 2d 279, 287.

exceed the costs of operating a well, the well is plugged and abandoned. Obviously the greater the price that can be obtained for the gas the longer a well can be economically operated. Conversely, the greater the costs imposed upon the producer the earlier a well will be economically unprofitable and will be abandoned. Not only do the receipts minus the costs motivate the producer in the interest of his own solvency, but the typical forms of oil and gas leases, such as here involved, provide that they shall terminate if after a stated period (called the primary term) the property leased ceases to produce oil or gas *in paying quantities*. Thus the lessee actually loses title and is required to plug and abandon his wells when his receipts for the gas or oil produced fail to exceed his costs of operating the lease. *Gypsy* v. *Marsh*, 121 Okl. 135, 248 P. 329, 48 A. L. R. 876.

In the *Cities Service case* the Supreme Court of Oklahoma and this Court considered the validity of the 7c minimum price order as applied to producers such as Peerless and Phillips. The effect of the order was to require those producers to receive for the gas which they produced the minimum price of 7c per Mcf. Naturally, if they were not already receiving that amount, the effect of the order was to increase their revenues with the consequence that their wells could be produced for a longer period of time or to a nearer point of exhaustion than would otherwise be the case. Contrasted with that situation, the minimum price orders as construed and applied by the Court of Appeals, instead of providing additional revenue for the producers

from the production of gas, impose additional costs upon the producers. The result necessarily will be that the net revenue from the production of gas will be decreased with the inevitable consequence that production will be abandoned at an earlier stage, leaving greater quantities of gas in the ground unproduced and unrecoverable than would otherwise be the case.[16] The result of the decision below will therefore be irreparable damage not only to petitioner but to the state, to consumers and to the nation.

To say therefore that the *Cities Service case* sustained the constitutionality of the orders as here construed as a waste prevention measure is to say that opposites are alike.

The Orders as here Construed and Applied do not Protect Correlative Rights

The *Cities Service case* sustained the constitutionality of the 7c order as there applied on the additional ground that it protected correlative rights. In holding the

[16] It may be contended that the orders rqeuire the producer to receive for his gas the minimum price as well as to pay overriding royalties at the minimum price, and inasmuch as his interest in the production exceeds that of his royalty owners', the net result of the orders is an increase in revenue to the producer. The answer is obvious and is illustrated by the facts of this case. Petitioner was already receiving the minimum price of 7c when the first order was made, as was decided by the Commission and by the Supreme Court of Oklahoma. *Cities Service Gas Company* v. *Peerless Oil and Gas Company*, 203 Okl. 35, 220 P. 2d 279. Phillips therefore received no increase in revenue under the 7c order, but under the decision of the Court of Appeals is required to increase its payment to Cabot from 4c, as provided by the contract, to 7c per Mcf times ¼ of ⅞ of the gas produced.

decisions applicable to the orders as here construed and applied the Court of Appeals has obviously misconceived the meaning of the term "correlative rights."

No correlative rights are involved here. The doctrine of correlative rights has to do with the situation where each owner or lessee of *separately owned tracts* by the very nature of things has a coequal right to drill on his own land and take gas from the common reservoir without control by or over the other.[17] Summers Oil and Gas (2d Ed.), Vol. 1, Section 63, p. 180, defines the term "correlative rights" as follows:

> "The term 'correlative rights' is merely a convenient method of indicating that each owner of land in a common source of supply of oil and gas has legal privileges *as against other owners* of land therein to take oil or gas therefrom by lawful operations conducted on his own land limited, however, by duties to other owners not to injure the source of supply and by duties not to take an undue proportion of the oil and gas."

The doctrine does not apply as between those having interests in the same land who by contract agree as to their respective rights and obligations. This is recognized by the Supreme Court of Oklahoma in the case of *Oklahoma Natural Gas Co.* v. *Choctow Gas Co.*, 205 Okl. 255, 236 P. 2d 970, 977, where it said:

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[17] *Ohio Oil Co.* v. *State of Indiana*, 177 U. S. 190; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210; *Bandini Petroleum Co.* v. *Sup. Ct. of California*, 284 U. S. 8; *Patterson* v. *Stanolind Oil & Gas Co.*, 182 Okl. 155, 77 P. 2d 83; *Alphonzo E. Bell Corp.* v. *Bell View Oil Syndicate*, 24 Cal. App. (2d) 587, 76 P. 2d 167; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55.

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"Neither was it to protect correlative rights in the common source of supply, *this doctrine being based upon protection of landowners and royalty owners against unfair taking by one not their lessee.*"

Cabot's rights under the contract are in no sense "correlative rights or interests." The payments to which it is entitled are purely a matter of right between two parties to a contract voluntarily entered into for a valuable consideration.

It is respectfully submitted therefore that the *Cities Service case* cannot fairly be said to have sustained the validity of the orders as here construed and applied on the ground of waste prevention or the protection of correlative rights.

It is also clear that the orders as here construed and applied cannot be sustained on the ground of waste prevention or the protection of correlative rights. It appears therefore that there is no public purpose to be served by requiring Phillips to pay Cabot the additional sum of money over and above the contract price for the leases, and the orders as so construed and applied violate Section 10 of Article 1 and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

III.

The Constitutional Questions Here Presented Could Have and Should Have Been Avoided by the Court of Appeals

(1) It is elementary that when a statute or order is susceptible to more than one construction, one of which

will render it unconstitutional, or even raise grave doubts of its constitutionality, the other construction will be adopted. *United States* v. *La Franca*, 282 U. S. 568, 574; *Kansas Gas & Electric Co.* v. *City of Independence, Kansas*, 79 F. 2d 32, 43; *Baccus* v. *Banks*, 199 Okl. 647, 192 P. 2d 683, 687.

The Court of Appeals therefore should have held that the orders did not apply to a fixed price overriding royalty and avoided the constitutional questions here raised. There can be no doubt that the orders are susceptible to that construction. Indeed it is the only construction that can be supported. See IV, *infra*, pp. 35-45.

(2) In interpreting and applying the minimum price orders for gas the federal courts are enmeshed in "as thorny a problem as has challenged the ingenuity and wisdom of legislatures." See *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 579; *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 318. It is the established policy of this Court that the federal courts should avoid passing upon questions of state law and policy concerning state conservation laws wherever possible. The evils resulting from federal court decisions of state law and policy before the state courts have passed upon them are forcefully pointed out by this Court in *Burford* v. *Sun Oil Co.*, *supra*.

The Court of Appeals therefore should have stayed further proceedings pending interpretation of the minimum price orders by the state courts or by the Commission that made them. *Shipman* v. *DuPre* (1950), 339 U. S. 321; *Railroad Commission of Texas* v. *Pullman*

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Co. (1941), 312 U. S. 496; *Spector Motor Service* v. *McLaughlin* (1944), 323 U. S. 101; *Chicago* v. *Fieldcrest Dairies* (1942), 316 U. S. 168.

The doctrine of primary administrative jurisdiction as applied by this Court to federal administrative agencies (*Slocum* v. *Del. L. & W. R. Co.*, 339 U. S. 239, see Annotations 94 L. ed. 806, and 96 L. ed. 585), should apply with even greater force to state administrative agencies. The record here discloses a situation where the federal courts have taken over the conservation authority of the Corporation Commission by construing and applying its orders in a manner directly contrary to the intent and purpose of the Commission.

The pendency of an appeal in the Supreme Court of Oklahoma from the order increasing the minimum prices, challenging the constitutionality of the order, with the ultimate decision, in all probability, to be made by this Court upon appeal from the Supreme Court of Oklahoma is an additional reason the Court of Appeals should have stayed further proceedings. If the order is stricken down, a substantial part of the judgment in this case will be without basis.

The incongruous result of the federal court resolving for itself questions of state law and policy is demonstrated by this case. Should the judgment of the Court of Appeals be allowed to stand, Cabot will recover from Phillips a substantial sum of money based upon the supposed intent of the Corporation Commission, when the Commission has said and formally decreed that its intent

was, and that the conservation of gas requires, the opposite to what the Court of Appeals determined.

This Court should not sanction the enrichment of Cabot at the expense of Phillips upon a definitely established mistake of the Court of Appeals in ascertaining the intent and purpose of the Corporation Commission of Oklahoma.

All the reasons for relegating the parties to state tribunals and all the vices for failure to do so pointed out by this Court in *Burford* v. *Sun Oil Co., supra*, are present here. This includes the system established by the Oklahoma legislature for fact finding and policy making by the Corporation Commission with review by the Supreme Court and the expeditious procedure for resolving questions such as the one here presented. This case fits squarely into the language of this Court in the *Burford case* (319 U. S. at p. 327).

But for the circumstance that petitioner and respondent were incorporated under the laws of different states, this action would necessarily have been brought in a state court and petitioner would have had the right of appeal to this Court from a decision such as the one rendered by the Court of Appeals if made by the highest court of a state (28 U. S. C. 1257[2]). The mere circumstance of diversity of citizenship should not be allowed to deprive petitioner of review by this Court of the serious constitutional question here presented, in the exercise of this Court's discretion in respect to certiorari.

IV.

The Court of Appeals Misinterpreted and Misapplied the Minimum Price Orders to the Fixed Price Overriding Royalty and Violated Settled State Law in Respect to the Ownership of Oil and Gas in Place

(a) The Court of Appeals' Interpretation is in Conflict with the Language of the Orders, with Their Basic Purpose, and with the Findings of the Commission.

What we have to say here is in addition to the very vital point covered in I, *supra*, pp. 13-20. If our contentions there made are sustained it will be unnecessary for the Court to consider this point.

Standing alone, this subdivision (a) is one with which this Court ordinarily would not concern itself. *Huddleston* v. *Dwyer*, 322 U. S. 232, 237. But in view of the fact that the interpretation and application of the orders by the Court of Appeals has presented a serious constitutional question (see II, *supra*, p. 20), this Court is concerned in determining whether the constitutional question could have and should have been avoided by a different interpretation of the orders and in determining whether the situation was such that the Court of Appeals should have declined to interpret the orders until the state tribunals had interpreted them (see III, *supra*, p. 31). Moreover, this subdivision (a) is an important introduction to subdivision (c) of the same point (*infra*, p. 42), which is one of the grounds for granting certiorari specified by the rules of this Court (Rule 19-1[b]).

Findings of Price Orders

The Court states in its opinion that "it is to be noted that the orders by the Commisison do not refer to *sales or purchases by producers.*" Neither the orders, the record nor the findings on which the orders were based mention "*purchases by producers.*"

The orders do, however, contrary to the statement by the Court, repeatedly refer to "sales * * * by producers" and the "price" received *by the producers* therefor.

Except for the findings referred to below *all* of the findings of both the 7c order and the 9.8262c order have to do *exclusively* with market conditions and prices as they relate to sales by or what the producer realizes for the gas or as they may affect persons whose rights by contract or otherwise are measured by or are dependent upon market conditions or prices. Cabot is not in this class inasmuch as its rights are not measured by or dependent on "market conditions" or "price" in the field.

The *only* findings or reference in either of the two orders that mention royalty owners or others than the producers or the purchasers from producers are Findings Nos. 6 and 32(c) and (d) of the 7c order and Finding No. 7 of the 9.8262c order. Finding No. 6 of the 7c order finds that "the Texas County Land and Royalty Owners Association and the School Land Commission of the State of Oklahoma are the owners of minerals situated and located in the common source of supply aforesaid and are therefore interested in the matters and things

involved herein." Finding No. 32(c) of the 7c order and Finding No. 7(c) of the 9.8262c order find that the taking of gas from the field at "prices" prevalent in the field causes "loss to the royalty owners in said field" and "loss to the State of Oklahoma in revenues in the form of gross production taxes." These are the only findings that would give the slightest indication of an interest on the part of the Commission in what others than the producer may receive.

These last named findings can only have reference to those royalty owners and the State whose rights and interests are directly measured by or are related to market value or what the *producer receives*. The State, referred to in Finding No. 32(d) of the 7c order and 7(d) of the 9.8262c order, is in the same situation as the typical royalty owners. Its gross production tax is measured by a percentage of the market value of the gas. Section 821, Title 68, O. S. 1951.

The purpose of the orders as applying only to sales and the amount realized by the producer is made clear by the findings of the Commission in Order No. 19702 (R. 84) denying Phillips' application to either vacate or clarify the 7c order. Order No. 19702 finds that Phillips was complying with the 7c order because it *as a producer* was itself realizing the equivalent of the 7c minimum price. Finding No. 5 of Order No. 19702 (R. 86) recites that "said orders *were meant* to prohibit the production of natural gas from the producing formations in

said field unless same was *sold*, * * * but if not sold, that said gas should be utilized and/or sold, *that the producer would realize therefrom* the equivalent of 7c per thousand cubic feet * * *." Finding No. 6 (R. 86) finds "that inefficient and wasteful utilization of natural gas produced in said field have resulted and will result, *unless producers in said field* receive for said natural gas or realize the equivalent of 7c per thousand cubic feet of natural gas at the wellhead, * * *." The further findings of Finding No. 6 (R. 86) with respect to discrimination adversely affecting "many producers and royalty owners" and the dissipation and waste of gas to the "detriment of the producers, royalty owners, School Land Commission, and the State of Oklahoma," like Findings Nos. 32(c) and (d) of the 7c order and 7(c) and (d) of the 9.8262c order, can have only to do with those producers and royalty owners, the State of Oklahoma *et al.*, whose rights and interests are measured by the field price and who for that reason are benefited if the price is high or injured if the price is low.

Purposes of Orders

The further fact that *conclusively* demonstrates that the minimum price orders were not intended to apply to a situation such as here involved is that such an application of the orders has no reasonable relationship to the stated purposes of the orders.

The Commission in Finding No. 34 of the 7c order (R. 67) and Finding No. 13 of the 9.8262c order (R.

100), which are identical except for the specified price, expressly states that the orders are entered "for the purpose of preventing waste, economic and physical, of natural gas, for the purpose of protecting correlative rights, and to assure the greatest ultimate recovery of natural gas from the reservoir * * *." In referring to the 7c order and the appeal thereof to the Supreme Court of Oklahoma and the Supreme Court of the United States, Finding No. 5 of the 9.8262c order (R. 98) finds that those courts "upheld the jurisdiction of the Corporation Commission to fix the price of gas in this particular field *for the purpose of conservation and the protection of correlative rights.*" In Order No. 24745 (R. 95) the Commission, in referring to the 7c order, said, " * * * the prevention of waste * * * is the basic purpose of said order."

The orders as here applied have no reasonable relation to either of said purposes, as we have shown (see II, *supra*, pp. 27-31).

So long as Phillips, the producer, obtains the required price for the gas and is thus able as the producer to fully and properly develop the properties and obtain therefrom its fair share of the gas in the reservoir, the interests of conservation are promoted and the correlative rights of both Phillips and Cabot are fully protected in relation to like rights of *adjoining* landowners.

Since, therefore, the application of the orders to payments by Phillips to Cabot in no way accomplishes or has any reasonable relationship to the express purposes

of the orders, then certainly the orders cannot be construed to apply to such payments.

What we have said above is not inconsistent with but is supported by the decision of the Oklahoma Supreme Court in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 203 Okl. 35, 220 P. 2d 279, 286, 287, 288.

Everything said in that case concerning royalty owners shows that the Court was thinking only of the conventional or "typical" royalty owners whose royalty depends upon the sale price of the gas by the producer or the market value thereof.

It is clear that the court there considered the order as fixing the price that the producer should receive for the gas as a condition to production, with the resultant benefits to the State, to royalty owners and others whose interests depend upon the price which the producer received, or the market value of the gas. There was no suggestion in that opinion that the order could conceivably apply to change the terms of a contract which provided for a fixed overriding royalty such as that here involved.

(b) As Construed and Applied by the Court of Appeals, the Minimum Price Orders Exceed the Statutory Power of the Corporation Commission.

It goes without saying, in the absence of clear and unmistakable language, that the orders will not be construed in such way as to exceed the authority of the Commission to make them.

The Supreme Court of Oklahoma said in the *Cities Service case* (203 Okl. 35, 220 P. 2d 279) that the 7c minimum price order (the only one before it) was entered pursuant to the authority of the last sentence of Section 239, Title 52, Oklahoma Statutes 1941 (now (1951), reading as follows:

> "The said commission is authorized and directed * * * to regulate the taking of natural gas from any or all such common sources of supply within the state, *so as to prevent waste, protect the interests of the public, and of all those having a right to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another.*"

In referring to such authority the court said:

> "The standard to guide the Commission in acting thereunder is the prevention of waste, the protection of the interest of the public, and the protection of the interest of all those having a right to produce from such common source of supply" (220 P. 2d 288).

We have already seen that the orders as construed and applied below do not prevent waste, do not protect any interest of the public, and do not protect correlative rights. The statutory provision concerning the protection "of all those having a right to produce from such common source of supply," is the same thing as correlative rights. Cabot, of course, has no right to produce, it having conveyed all of its rights to produce to Phillips. Cabot's rights, which are limited to the receipt of the overriding royalty payment, are fully protected when Phillips' rights as the producer are protected. Cabot's roy-

alty is measured in direct proportion to the amount of gas produced by Phillips.

To require Phillips to pay Cabot substantially double the amount provided for in the contract between the parties is not the "protection" of anybody's "right," but on the contrary, is to arbitrarily take from Phillips and confer upon Cabot a "right" to which Cabot is not entitled under the terms of the contract, without serving any purpose specified by the statute under which the Commission derives its authority.

(c) In Interpreting the Minimum Price Orders, the Court of Appeals has Violated Settled Law in Oklahoma in Respect to the Ownership of Oil and Gas in Place.

The Court of Appeals said (210 F. 2d at p. 843):

"The clear import of the regulations is that the first transaction involving the obligations *to pay or account for gas* removed from the producing horizon must be at the prices at the well head as fixed in the regulations. Thus if an operator removes its own gas it must receive the prices fixed in the order at the well head *and if it acquires the interest in the gas reserved to others* it must pay or account to them for the minimum prices fixed at the well head.

"*It is not correct to say that Cabot owned no interest in the gas in place.*

* * * * * * *

"The contract between Phillips and Cabot recognizes a *right in Cabot to an interest in the gas in place.* In the contracts and leases the *parties treated Cabot as the owner of the gas.* * * * Such provisions are wholly inconsistent with the premise that Phillips became the owner of all the gas at the instant

of production and that Cabot had no interest therein."

The result is that a Federal Court in this case has adopted a rule of ownership of gas in place contrary to the repeated decisions of the Supreme Court of Oklahoma holding that oil and gas by their very nature are not "capable" or "susceptible" of ownership prior to production.[18]

The case of *Rich* v. *Doneghey*, 71 Okl. 204, 177 P. 86, holds that regardless of the contract of the parties purporting to provide otherwise, that "no title" or "estate" could vest before production. In the case of *Sunray Oil Co.* v. *Cortez Oil Co.*, 188 Okl. 690, 112 P. 2d 792, 793, the court said that "no title to any corporeal right or *interest*" could vest before production. A number of the cases say that "*no title*" vests prior to production. It cannot be said that Cabot owns "an interest" in the gas in place before production which it sells to Phillips, in the face of the Oklahoma rule that *no title* or *no estate* can vest before production.

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[18] A few such cases are: *Kolachny* v. *Galbreath* (1910), 26 Okl. 772, 110 P. 902, 906; *Frank Oil Co.* v. *Belleview Gas & Oil Co.* (1911), 29 Okl. 719, 119 P. 260, 261; *Priddy* v. *Thompson* (8 C.C.A., 1913), 204 F. 955, 960; *Rich* v. *Doneghey* (1918), 71 Okl. 204, 177 P. 2d 86, 89-90; *Garfield Oil Co.* v. *Champlin* (1920) 78 Okl. 91, 189 P. 514, 515; *Carter* v. *Rector* (1922), 88 Okl. 12, 210 P. 1035, 1036; *Crain* v. *Pure Oil Co.* (8 C.C.A., 1928), 25 F. 2d 824, 826-827; *Alexander* v. *King* (10 C.C.A., 1931), 46 F. 2d 235, 238-239, 74 A.L.R. 174, cert. denied 283 U. S. 845, 75 L. ed. 1455; *Alexander* v. *Continental Petroleum Co.* (10 C.C.A., 1933), 63 F. 2d 927, 928; *Cuff* v. *Koslosky* (1933), 165 Okl. 135, 25 P. 2d 290; *White* v. *McVey* (1934), 168 Okl. 19, 31 P. 2d 850; *American Oil & Refining Co.* v. *Cornish* (1935), 173 Okl. 470, 49 P. 2d 81; *United States* v. *Stanolind Crude Oil*

In *Replogle* v. *Indian Territory Illuminating Oil Co.*, 193 Okl. 361, 143 P. 2d 1002, the Court held that no title to gas in place could be reserved by the lessor, hence, the payment of royalty under the terms of a lease was not the payment of the purchase price of gas.

The Court of Appeals apparently recognizes the existence of these decisions but seems to regard them as being inconsistent with themselves and with an Oklahoma statute. (See 210 F. 2d at p. 843).

Contrary to the Court's statement, not a single one of the Oklahoma cases we have been able to find (and the Court cites none) holds that a conveyance or reservation of mineral rights separate and apart from the right to explore and produce the same *"constitutes an interest in such minerals."* There are cases which hold that such a conveyance is a grant of an interest in or affecting the *land* but not an "interest" in the "minerals." *Cuff* v. *Koslosky* (1933), 165 Okl. 135, 25 P. 2d 290; *Martin* v. *Atkinson, Warren & Henley Co.* (1945), 195 Okl. 19, 154 P. 2d 945; *Cornelius* v. *Jackson* (1948), 201 Okl. 667, 209 P. 2d 166, appeal dismissed 335 U. S. 906, 93 L. ed 440.

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[18] *Continued*

Purchasing Co. (10 C.C.A., 1940), 113 F. 2d 194, 198; *Sunray Oil Co.* v. *Cortez Oil Co.* (1941), 188 Okl. 690, 112 P. 2d 792, 793; *Harmon* v. *Oklahoma Tax Commission* (1941), 189 Okl. 475, 118 P. 2d 205, 208-209; *Replogle* v. *Indian Territory Illuminating Oil Co.* (1943), 193 Okl. 361, 143 P. 2d 1002, 1007; *Continental Supply Co.* v. *Marshall* (10 C.C.A., 1945), 152 F. 2d 300, 305-306; *Magnolia Petroleum Co.* v. *Ball* (1950), 203 Okla. 514, 223 P. 2d 136.

The only right or interest in the gas which Cabot had or could have as the gas lessee or fee owner of gas rights was the right to explore for and reduce the gas to possession and thereupon acquire title to the same (*Rich* v. *Doneghey*, 71 Okl. 204, 177 P. 86, 90). Cabot assigned all these rights to Phillips. All Cabot reserved was the right to be paid a fixed sum measured by the amount of gas produced — an overriding royalty. That right is an interest in the *land* — a valuable property right which Cabot can convey, as the Oklahoma Supreme Court said in *Magnolia Petroleum Co.* v. *Ball*, 203 Okl. 514, 223 P. 2d 136, but that is far from saying that it is title to any interest in the gas. Cabot's override, its "interest in the land," its "valuable property right which may be conveyed" does not pass to Phillips as the gas is produced, as title to the gas would if Cabot owned it in place.

The Court of Appeals was in error therefore in concluding that the Oklahoma cases are in any way inconsistent in their holdings that no one owns gas or oil in Oklahoma before it is produced and reduced to possession.

Citing the Oklahoma statute in the face of explicit decisions of the Oklahoma Supreme Court since the statute was enacted can only mean that the Court of Appeals thought the Oklahoma Court had erred in determining the state law.

It is the duty of the Court of Appeals to follow the decisions of the state courts "whether believed to be sound or unsound." *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 180.

CONCLUSION

It is respectfully submitted that a Writ of Certiorari should be granted and that the decision of the Court of Appeals should be reversed, or the case remanded to the Court of Appeals for reconsideration in the light of the order of the Corporation Commission of Oklahoma interpreting and applying the minimum gas price orders differently than did the Court of Appeals.

RAYBURN L. FOSTER,
HARRY D. TURNER,
R. M. WILLIAMS,
Phillips Building,
Bartlesville, Oklahoma;

CECIL C. HAMILTON,
1211 First National Building,
Oklahoma City, Oklahoma,
Attorneys for Petitioner.

AUGUST, 1954.

APPENDIX "A"

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

CAUSE CD No. 5748

ORDER No. 28884

Application of Phillips Petroleum Company for an Order Clarifying Order No. 19514 in Cause CD No. 1054, and Order No. 26096 in Cause CD No. 3628, and for an Order in Respect to Fixed Overriding Royalty Payments in the Guymon-Hugoton Field, Texas County, Oklahoma.

REPORT OF THE COMMISSION

This cause came on for hearing before the Corporation Commission of the State of Oklahoma on the 9th day of June, 1954, at 10 o'clock, a.m., in the Commission's Courtroom, Capitol Office Building, Oklahoma City, Oklahoma: the Honorable Ray O. Weems, Vice-Chairman and Ray C. Jones, Commissioner, sitting.

R. M. Williams and Cecil C. Hamilton appeared for Phillips Petroleum Company; Robert M. Rainey, Streeter B. Flynn and Homer D. Johnson appeared for Cabot Carbon Company; Fisher Ames appeared for The Texas Company; and Floyd Green, Conservation Attorney and Ferrill Rogers, Assistant Conservation Attorney, appeared for the Corporation Commission.

When the cause was called, Cabot Carbon Company and The Texas Company filed and presented their separate motions to dismiss the application on the grounds the Commission was without jurisdiction and that the application was frivolous, which motions were heard and taken under advisement by the Commission, follow-

ing which the hearing was continued to June 11, 1954, at 10 o'clock, a.m. When the cause was called for hearing on June 11, 1954, at 10 o'clock a.m., all parties announced ready and the Commission proceeded to hear the cause. At the conclusion of the hearing on June 11, 1954, the cause was continued for further hearing to June 22, 1954, at 10 o'clock, a.m., on which date the hearing was further continued to June 23, 1954, at 10 o'clock, a.m. The cause came on for further hearing on June 23, 1954, at 10 o'clock, a.m., and at the conclusion of the hearing on that date was continued to July 9, 1954, at 10 o'clock, a.m., for further hearing. At the conclusion of the hearing on July 9, 1954, the Commission closed the cause and took the same under advisement.

Now, on this 16th day of July, 1954, the Commission having considered the matter in conference and being well and sufficiently advised in the premises, grants the application herein and makes the following findings and orders in respect thereto.

FINDINGS

1. This is an application by Phillips Petroleum Company, a producer of gas in the Guymon-Hugoton Field in Texas County, Oklahoma, for an order of the Commission interpreting and clarifying Order No. 19514 entered by the Commission in Cause CD No. 1054 and Order No. 26096 entered by the Commission in Cause CD No. 3628 in respect to the application of said orders to overriding royalty payments which by contract are payable by applicant, or other producers similarly situated, at a fixed rate or on a basis not dependent upon or measured by the market value or the proceeds of sale of the gas, and for an order directing that a producer shall not be required by reason of said Order No. 19514 or

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Order No. 26096 to pay the owner of any such overriding royalty interest in the Guymon-Hugoton Field any sum in excess of that expressly required to be paid by the terms of the overriding royalty contract, and for such other and appropriate action as may be proper in the premises.

2. Due and proper notice of the filing of said application and of the time and place of the hearing thereof has been given in all respects as by law required and that the Commission has jurisdiction over the subject matter of said application; that the separate motions of Cabot Carbon Company and The Texas Company to dismiss the application herein should be denied.

3. The Commission, by its Order No. 19514, entered in Cause CD No. 1054, on December 9, 1946 provided that from and after January 1, 1947, no gas shall be produced from the Guymon-Hugoton Field at a price at the wellhead of less than 7c per thousand cubic feet measured at a pressure of 14.65 pounds per square inch absolute, and by its Order No. 26096 entered in Cause CD No. 3628 on July 29, 1952, increased such minimum price effective from and after August 1, 1952, to 9.8262c per thousand cubic feet.

4. The Commission by findings contained in its Order No. 19702 entered in Cause CD No. 1054, on February 4, 1947, interpreted said Order No. 19514 to prohibit the production and sale of gas from said field unless the "producer" realized therefrom the equivalent of the prescribed minimum price at the wellhead, and further found that Phillips Petroleum Company was at that date in compliance with said order because it, as a producer was realizing the equivalent of the prescribed minimum price for the gas produced by it from said field.

5. Said Order No. 19514 and Order No. 26096 were intended and are to be interpreted and applied as a regulation of the production of gas from the Guymon-Hugoton Field by and to the extent of requiring that a producer, who has the right to operate wells or to take or to market the gas therefrom, receive or realize for the gas so produced a sum equivalent to the prescribed minimum price. In entering said orders the Commission contemplated and intended that the landowners, usual and typical royalty owners, and other persons whose royalty, overriding royalty or other interest in the gas is by contract measured by or dependent upon the market value or proceeds of sale thereof by the producer would under and as a consequence of the terms of their contracts be entitled to payment based upon the minimum price the producer is so required to realize. It was not the intent of the Commission nor the purpose of said orders to modify or affect in any way the contractual basis or rate of royalty or overriding royalty, or other payments required to be paid by such producer or to require that such producer pay the owner of any such royalty, overriding royalty or other interest in the gas a sum in excess of that required to be paid by the contract. The Commission does not consider that it has such authority. To require such producer to pay to the owner of a royalty, overriding royalty or other interest in the gas a sum in excess of that required to be paid by their contract would in no way prevent or tend to prevent either physical or economic waste of natural gas, protect or tend to protect the correlative rights of any person or persons owning any interest in the Guymon-Hugoton Field or in any way protect the interest of the public.

V

ORDER

IT IS THEREFORE ORDERED by the Corporation Commission of the State of Oklahoma as follows:

1. That the separate motions of Cabot Carbon Company and The Texas Company to dismiss the application herein be, and the same are hereby, denied.

2. That Order No. 19514 in Cause CD No. 1054 and Order No. 26096 in Cause CD No. 3628 shall be interpreted and applied in accordance with the purpose and intent ascribed thereto in Finding No. 5 hereof, which interpretation and clarification of said orders shall become and be treated and regarded as a part of said orders and shall have the same force and effect as if expressly stated in the orders when originally entered.

3. That no producer in the Guymon-Hugoton Field shall be required by reason of either said Order No. 19514 or Order No. 26096, to pay to the owners of any royalty, overriding royalty or other interests in the gas any sum in excess of that required to be paid by the terms of their contract.

4. If any paragraph, sentence or phrase of this order should for any reason be declared invalid by any court of competent jurisdiction, such invalidity shall not in any way invalidate or affect any other paragraph, sentence or phrase of this order, but the same shall continue in full force and effect.

DONE AND PERFORMED this 16th day of July, 1954.

CORPORATION COMMISSION
OF OKLAHOMA

Ray O. Weems, Chairman
Ray C. Jones, Vice-Chairman

ATTEST:
Tom McMurrary, Secretary

APPENDIX "A-1"

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

CAUSE CD NO. 5748

Application of Phillips Petroleum Company for an Order Clarifying Order No. 19514 in Cause CD No. 1054 and Order No. 26096 in Cause CD No. 3628 and for an Order in Respect to Fixed Overriding Royalty Payments in the Guymon-Hugoton Field, Texas County, Oklahoma.

APPLICATION

Phillips Petroleum Company, a producer of gas in the Guymon-Hugoton Field in Texas County, Oklahoma, hereby makes application for an order by the Commission clarifying Order No. 19514 in Cause CD No. 1054 and Order No. 26096 in Cause CD No. 3628 and for an order in respect to overriding royalty payments in said field which by contract are payable by applicant or other producers similarly situated at a fixed rate not dependent on the market value or proceeds of the gas produced.

As grounds for such application, applicant respectfully shows to the Commission:

1. Said Order No. 19514 in Cause CD No. 1054 was entered by the Commission on December 9, 1946, and provides that from and after January 1, 1947, no gas shall be produced from the Guymon-Hugoton Field at a price at the wellhead of less than 7c per Mcf measured

at a pressure of 14.65 pounds per square inch absolute. Said Order No. 26096 in Cause CD No. 3628 was entered by the Commission on July 29, 1952, and increases such minimum price effective from and after August 1, 1952, to 9.8262c per Mcf.

2. The Commission by its further Order No. 19702 entered February 4, 1947, in said Cause CD No. 1054, interpreted said Order No. 19514 to prohibit the production of gas from said field unless the "producer" realized therefrom the equivalent of the prescribed minimum price at the wellhead, and further found that applicant was at that time in compliance with said order because it as a producer was realizing the equivalent of the prescribed minimum price for the gas produced by it from said field.

3. Applicant during all of the time said Order No. 19514 was effective realized substantially the same amount for the gas produced by it as was being so realized at the time said Order No. 19702 was entered, and from and after the time said Order No. 26096 became effective has realized for all of the gas produced by it the equivalent of the minimum price therein prescribed.

4. Applicant for all of the time said Order No. 19514 and Order No. 26096 have been effective has paid its royalty owners, the State of Oklahoma and all others to whom applicant was, by contract or otherwise, obligated to make any payment by way of royalty, overriding royalty or taxes based on market value or proceeds of the gas produced by it from the Guymon-Hugoton Field at a rate per Mcf at the wellhead equal to or in excess of the minimum prices so prescribed thereby.

5. Cabot Carbon Company and The Texas Company, with whom applicant has contracts providing for the payment by applicant to said companies of overrid-

ing royalties in a fixed sum per Mcf of a designated percentage of the gas produced, as distinguished from the usual and typical royalty or overriding royalty measured by the market value or proceeds of sale thereof, are now claiming that said Order No. 19514 and Order No. 26096 were intended by the Commission and are to be interpreted to apply to and modify said contracts to the extent of requiring applicant, the producer, to pay said overriding royalties at the rates of payments per Mcf prsecribed by said Order No. 19514 and Order No. 26096 rather than at the fixed rates of payment prescribed and agreed upon by the parties in said contracts and are presently suing applicant for the differences between the amounts paid under the terms of said contracts and the amounts claimed to be due under said orders to November 1, 1952, in the case of the suit by Cabot Carbon Company and to the date on which the petition was last amended, namely, August 29, 1952, in the case of the suit by The Texas Company. Applicant has at all times fully accounted for and paid said overriding royalties at the rates agreed upon and prescribed in said contracts.

6. Applicant does not desire to be in violation of said orders either retroactively or prospectively and therefore desires an order of the Commission clarifying said orders as to whether or not they were intended by the Commission or are to be interpreted to apply to and modify the overriding royalty provisions of the aforesaid contracts as claimed by Cabot Carbon Company and The Texas Company and an order directing that applicant and other producers similarly situated shall not be required by reason of any order of the Commission to pay the owner of any such overriding royalty interest in the Guymon-Hugoton Field any sum in excess of that ex-

pressly required to be paid by the terms of the royalty contract.

7. The aforesaid contracts with Cabot Carbon Company and The Texas Company are lease purchase contracts under which applicant acquired from each of the respective companies a part of the gas leases from which applicant is producing gas in the Guymon-Hugoton Field. The overriding royalties so provided for therein are a part of the negotiated consideration payable by applicant for the leases acquired by it thereunder and is in addition to the usual and typical 1/8 royalty payable under the leases to the lessors thereof. Under neither contract is the amount of the overriding royalty determined or affected by the field price, market value or proceeds of sale of the gas produced. By the further terms and provisions thereof and of the leases, assignments and other instruments exchanged by the parties pursuant thereto, applicant became and is the lessee of the lands covered thereby with the exclusive right to explore, develop and operate the same for the production of gas, which, when produced, is the sole property of applicant, who has the exclusive possessory right thereto and the exclusive right to market, use or otherwise dispose thereof as it sees fit, subject only to the obligation to pay the royalties provided for in said contracts, leases and assignments, all without cost to either Cabot Carbon Company, The Texas Company or the lessors under said leases.

8. There is nothing in either said Order No. 19514 or Order No. 26096 that would indicate any intent or purpose on the part of the Commission to thereby regulate, amend or change in any way the contractual basis or rate of overriding payments by a producer or to ex-

ercise any authority or jurisdiction in such respect. As disclosed by the record of the proceedings and hearings pursuant to which said orders were entered, the only type of royalty contract therein considered was the usual and typical type in the field whereby the royalty is determined by the market value or proceeds of the gas produced. The protection or benefit which those other than the producer sought to obtain was that which would incidentally accrue to them under the express terms of their royalty contracts as the result of the regulation of the minimum price received by the producer. The regulation or modification of the agreed basis of overriding royalty payments in the field was not before or considered by the Commission.

9. An interpretation or application of said Order No. 19514 or Order No. 26096 or any other order which would require a producer to pay to the owner of a fixed payment overriding royalty interest a sum in excess of that expressly required to be paid by his contract would not (a) prevent or tend to prevent either physical or economic waste of natural gas; (b) protect or tend to protect the correlative rights of any person or persons owning any interest in the Guymon-Hugoton Field; or (c) in any way protect the interest of the public. On the contrary, such an interpretation and application of said orders (a) would cause or tend to cause both physical and economic waste of gas in that it would substantially increase the costs of the producer and thereby limit what the producer can afford to do to secure the greatest ultimate recovery of gas from its wells, shorten the economic and productive life thereof, and prevent the drilling of edge or marginal wells; (b) would take from the producer valuable contract rights it otherwise has and arbitrarily give to the owners of such overriding royalty in-

terests rights to which they are not entitled; and (c) because of the waste caused or tended to be caused, would be injurious to the interests of the public.

10. An interpretation or application of said Order No. 19514 or Order No. 26096 such as would require applicant, the producer, to pay to Cabot Carbon Company or The Texas Company sums in excess of those expressly required to be paid by their respective contracts, would serve no public purpose within the exercise of the police power of the state and would constitute a taking of private property without due process of law and an impairment of contract in violation of Sections 7 and 15 of Article II of the Oklahoma Constitution and Section 10 of Article I and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

WHEREFORE, applicant prays that this application be set for hearing and that notice thereof be given as by law required and that upon said hearing the Commission enter an order clarifying said Order No. 19514 and Order No. 26096 in respect to the interpretation and application of said orders to overriding royalty payments which by contract are payable by applicant or other producers similarly situated at a fixed rate not dependent upon market value or proceeds of the gas produced, and for an order ordering that a producer shall not be required by reason of any order of the Commission to pay the owner of any such overriding royalty interest in the Guymon-Hugoton Field any sum in excess of that expressly required to be paid by the terms of the overriding royalty contract, and for such other and appropriate action as may be proper in the premises.

/s/ Harry D. Turner
Harry D. Turner

/s/ R. M. Williams
R. M. Williams
/s/ Cecil C. Hamilton
Cecil C. Hamilton
/s/ Kenneth Heady
Kenneth Heady
Attorneys for Applicant
Phillips Petroleum Company.

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APPENDIX "B"

TITLE 52, SECTION 239, OKLAHOMA STATUTES 1951.

"§239. COMMON SOURCE OF SUPPLY—EXCESS GAS SUPPLY—APPORTIONMENT AND REGULATION TO PREVENT WASTE. Whenever the full production from any common source of supply of natural gas in this state is in excess of the market demand, then any person, firm or corporation, having the right to drill into and produce gas from any such common source of supply, may take therefrom only such proportion of the natural gas that may be marketed without waste, as the natural flow of the well or wells owned or controlled by any such person, firm or corporation bears to the total natural flow of such common source of supply having due regard to the acreage drained by each well, so as to prevent any such person, firm or corporation securing any unfair proportion of the gas therefrom; provided, that the Corporation Commission may by proper order, permit the taking of a

greater amount whenever it shall deem such taking reasonable or equitable. The said commission is authorized and directed to prescribe rules and regulations for the determination of the natural flow of any such well or wells, and to regulate the taking of natural gas from any or all such common sources of supply within the state, so as to prevent waste, protect the interests of the public, and of all those having a right to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another. Laws 1915, ch. 197, §4."

TITLE 52, SECTION 112, OKLAHOMA STATUTES 1951.

"§112. APPLICATION TO AMEND OR MODIFY ORDERS —HEARING—APPEAL. Any person affected by any Legislative or administrative order of the Commission shall have the right at any time to apply to the Commission to repeal, amend, modify, or supplement the same. Such application shall be in writing and shall be heard as expeditiously as possible after notice of the hearing thereon shall have been given in the manner provided by Section 14 of this Act. An appeal shall lie to the Supreme Court from any order made by the Commission in any such proceedings or from the refusal of the Commission to make any order petitioned for therein, in the same manner and within the same time in which other appeals are authorized to be taken by the provisions of this Act, and, on any such appeal, the Supreme Court may affirm the order of the Commission, or the Commission's action in refusing to make the order petitioned for, or may itself make the order which the Commission should have made, or remand the cause to the Commission with direc-

tions to make such order as the Supreme Court may determine should have been made. Laws 1933, ch. 131, p. 292, § 29."

TITLE 52, SECTION 241, OKLAHOMA STATUTES 1951.

"§241. ENFORCEMENT OF ACT — HEARINGS BEFORE CORPORATION COMMISSION. — Any person, firm or corporation, or the Attorney General, on behalf of the state may institute proceedings before the Corporation Commission, or apply for a hearing before said commission, upon any question relating to the enforcement of this act; and jurisdiction is hereby conferred upon said commission to hear and determine the same, said commission shall set a time and place when such hearing shall be had and give reasonable notice thereof to all persons or classes interested therein by publication in some newspaper or newspapers having general circulation in the state, and shall in addition thereto cause notice to be served in writing upon any person, firm or corporation, complained against in the manner now provided by law for serving summons in civil actions. In the exercise and enforcement of such jurisdiction said commission is authorized to summon witnesses, make ancillary orders, and use such mesne and final process including inspection and punishment as for contempt, analogous to proceedings under its control over public service corporations as now provided by law. Laws 1915, ch. 197, § 6."

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